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IN THE

Supreme Court of the United States

October Term, 1966

No. 1058

MARTIN HIRSHHORN,
Petitioner,

v.

PEOPLE OF THE STATE OF NEW YORK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST DEPARTMENT

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MARTIN HIRSHHORN prays that a writ of certiorari issue to review the judgment of the Appellate Term of the Supreme Court of the State of New York, First Department, entered in the above-entitled case on September 29, 1966, which affirmed convictions under New York Penal Law §1747(b) and New York Code of Criminal Procedure §887(7).

Opinions Below

No opinions were rendered by the courts below.

Jurisdiction

The judgment of the court below was entered on September 29, 1966 (Appendix, *infra,* p. 21). A timely motion for leave to appeal to the Court of Appeals of the State of New York was denied on November 17, 1966 (Appendix, *infra,* p. 23). The jurisdiction of this Court is invoked under 28 U.S.C., §1257(3) since the validity of a state statute on grounds of repugnancy to the Constitution of the United States is drawn in question and because rights are claimed under the Constitution of the United States.

Questions Presented

1. Whether the conviction of petitioner pursuant to Section 887(7) of the New York Code of Criminal Procedure, for wearing feminine attire in public, violated the Fourteenth Amendment to the United States Constitution because said section as construed and as applied is an unreasonable and arbitrary exercise of the police power of the State of New York.

2. Whether the conviction of petitioner, a transvestite, pursuant to Section 887(7) of the New York Code of Criminal Procedure violates the Eighth and Fourteenth Amendments to the United States Constitution because it inflicts a cruel and unusual punishment upon petitioner.

3. Whether Section 887(7) of the New York Code of Criminal Procedure violates the Fourteenth Amendment

to the United States Constitution because it is vague, indefinite and fails to establish an ascertainable standard of guilt.

4. Whether the conviction under Penal Law Section 1747(b) should be reversed because the seizure of a bottle of barbiturates in petitioner's hotel room and its use at the trial violated the Fourth and Fourteenth Amendments to the United States Constitution because it was seized without a search warrant and the seizure was not incidental to a lawful arrest.

Constitutional Provisions and Statute Involved

The constitutional provisions involved are the First Amendment, the Fourth Amendment, the Eighth Amendment, and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

The statutory provision involved is Section 887(7) of the New York Code of Criminal Procedure which is as follows:

"§887. Who Are Vagrants.

"The following persons are vagrants:

"7. A person, who, having his face painted, discolored, covered or concealed, or being otherwise disguised, in a manner calculated to prevent his being identified, appears in a road or public highway, or in a field, lot, wood or inclosure."

Statement of the Case

On February 27, 1965, petitioner was employed as a licensed hairdresser (R. 113-14).[1] He wore women's clothes all the time and had been doing so for three years at the time of trial, at which time he was twenty years old (R. 113-14, 117-18, 133, 136-37). At the beauty parlor where he worked, his employer and fellow employees knew that he was a male as did most of his customers (R. 118). Petitioner was thought to be a "genuine transvestite" by the trial judge (R. 144, 145).

Petitioner was arrested without a warrant in his room at the Hotel Regent, located at 104th Street and Broadway in New York City, at about 1 A.M. in the morning of February 28, 1965 (R. 15, 75-76). The arrest was made by Detective Farrell (R. 75). At the same time his room was searched (R. 46-47, 107). The arresting officer did not have a search warrant (R. 12).

The sequence of events leading up to the arrest and search began two or three weeks prior thereto when Detective Farrell received a telephone call from Detective Panarella of the 75th Squad in Kings County (R. 87, 103). Detective Panarella apparently informed Detective Farrell that petitioner was charged with the commission of the crime of grand larceny and forgery in Kings County (R. 34-35, 87, 102). Farrell was given a description of petitioner and was told that he constantly dressed in female attire (R. 89). Panarella asked Farrell to make an arrest and then to call him so that he could bring petitioner back

1. "R" refers to the record on appeal in the court below.

to Brooklyn (R. 92). Panarella told Farrell that there was something to do with checks and the amount was over $100 (R. 35, 102). Farrell was not told whether Panarella received the information from another party (R. 104).

During the intervening two or three weeks prior to the arrest Farrell made several visits to the hotel to arrest petitioner but he was never there (R. 30, 38, 104). During this period Farrell never secured a warrant for petitioner's arrest because it "never occurred to me" (R. 104).

On February 27, 1965, at about 11 or 12 P.M. Detective Farrell and his partner went to the Hotel Regent (R. 27). Again petitioner was not at home, but the two detectives waited outside the hotel (R. 77). Thereafter, Farrell saw petitioner enter the hotel (R. 15, 27, 77, 97). Petitioner was dressed in female attire (R. 15, 77). At this point Detective Farrell did not recognize petitioner as the person he was seeking nor did he have any idea that he was a female impersonator (R. 31, 77-78). Farrell went into the hotel lobby but petitioner was not there (R. 15-16, 77). Farrell secured a key to petitioner's room from the night clerk and then proceeded to petitioner's room (R. 16, 78). He knocked on the door and identified himself as a police officer, knocked again and asked petitioner to open the door; petitioner then opened the door (R. 16, 35, 78). According to Farrell's testimony, he was dressed in a half-slip and a brassiere (R. 17, 79). Farrell recognized petitioner as the same person that he had seen on the street (R. 17, 81).

At this point the testimony of Detective Farrell is contradictory. He testified at the hearing on the motion to

suppress that he arrested petitioner when he appeared at the door for female impersonation (R. 13, 36), and that he did not arrest petitioner for grand larceny (R. 32). At the trial Detective Farrell testified that he arrested the petitioner when he opened the door on charges of grand larceny and forgery (R. 79, 109).

After entering petitioner's room Detective Farrell and his fellow officer made a thorough search of the premises (R. 46-47, 107), although they had no search warrant (R. 12). Detective Farrell testified that it never entered his mind that he would find any evidence of the grand larceny or forgery charges when he entered petitioner's room (R. 39), but that he and his fellow officer "were looking for any evidence of any violation of law" (R. 107). They found a bottle of barbiturates and a marijuana cigarette (R. 19, 80). There is conflicting testimony as to where the bottle of barbiturates was found. According to Detective Farrell it was found on petitioner's dresser (R. 19, 80). Petitioner testified that it was found in a box packed away in the closet (R. 125).

Petitioner was then taken to the 24th Precinct station house and was booked for possession of barbiturates and marijuana, and for impersonating a female (R. 109). He was not booked on forgery or larceny charges (R. 109). When Detective Farrell arraigned petitioner in Criminal Court in Manhattan he did not arraign him on grand larceny or forgery charges (R. 87).

Prior to trial, petitioner moved to suppress the materials seized in his hotel room when he was arrested, on

the ground that they were seized in violation of his rights under the Fourth Amendment (R. 8-65). The motion was denied (R. 7; Appendix, *infra*, p. 24). Petitioner was convicted by a judge without a jury of vagrancy, in that he violated Section 887(7) of the Code of Criminal Procedure by wearing female attire in a public place, and of unlawfully possessing barbiturates in violation of Section 1747(b) of the Penal Law (R. 143). Petitioner was sentenced to 30 days for violation of Section 1747(b) of the Penal Law, execution suspended, and to 10 days for violation of Section 887(7) of the Code of Criminal Procedure, execution suspended, with the warning that the court had his record and if he were ever found guilty in the future he would not receive the same consideration (R. 151-52). The judgments of conviction were unanimously affirmed without opinion by the Appellate Term of the Supreme Court of the State of New York, First Department (Appendix, *infra*, pp. 21-22). A motion to amend the remittitur was granted and the remittitur amended to show the Federal questions presented on appeal (Appendix, *infra*, pp. 25-26). These Federal questions were also raised at the motion to suppress (R. 8-65), and at the trial by motion (R. 73-74) and objection to the admission of evidence (R. 83). The motions were denied and the objection overruled.

Permission to appeal to the Court of Appeals of the State of New York was denied on November 17, 1966 (Appendix, *infra*, p. 23).

Reasons for Granting the Writ

I

The existence of the right to substantive due process as a safeguard of individual liberty from improper state action under the Fourteenth Amendment has long been recognized. As stated by this Court in *Meyer* v. *Nebraska,* 262 U.S. 390, 399-400 (1923):

> "The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts."

Accord, Pierce v. *Society of Sisters,* 268 U.S. 510 (1925).

Although the right of substantive due process today has limited application to economic, business, industrial or social regulations, *Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 488 (1955), this Court has recognized that there is a constitutionally significant distinction between regulations of that nature and regulations which infringe upon individual liberty. In *Griswold* v. *Connecticut,* 381 U.S. 479, 482 (1965), the Court considered the constitutionality of Connecticut's anti-contraceptive law:

> "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation."

See Henkin, " 'Selective Incorporation' in the Fourteenth Amendment," 73 Yale L.J. 74 (1963).[2]

This individual liberty which is protected includes "the full range of conduct which the individual is free to pursue." *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954).

The individual liberty which has been abridged here is the right to dress as one pleases. Unquestionably the right to dress according to one's taste in clothes is as fundamental and ancient as man's existence itself, and furthermore can be a significant means of individual expression. Any attempt to regiment dress has always been associated with totalitarian political systems and with repression of minorities.

Although Section 887(7) on its face would not appear to directly regulate dress as such, as construed and as applied to the facts herein, it punishes as a crime the mere wearing by a man of female attire. The totality of the evidence at trial with regard to the charge of violating this statute was that petitioner was seen by the arresting officer in female attire and that petitioner habitually wore female attire. The trial court found that this alone was sufficient to establish a violation (R. 143; Appendix, *infra*, p. 27).

Restrictions on the freedom and liberties of the individual are constitutional only if they are not arbitrary and

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2. "Substantive due process, as is well known, found its origin and its wild and questionable growth in regard to economic regulation; only comparatively recently has it begun to protect political and civil liberties." 73 Yale L. J. at 85.

are reasonably related to a purpose within the competency of the State to effect. *Meyer* v. *Nebraska, supra.*

The purpose of Section 887(7) is not readily apparent on its face. Reference to the legislative history reveals that the original purpose bears no relation to the present construction and application of this statute, and that there are no legislative findings relevant to such construction and application. Therefore, the presumption of constitutionality which might ordinarily attach does not prevail.

Section 887(7) in its original form was enacted in 1845 and was entitled "An Act to Prevent Persons Appearing Disguised and Armed." N.Y. Sess. Laws 1845, ch. 3, §1. The statute was an attempt to regulate certain violent anti-rent demonstrations by tenant farmers. Specifically, its purpose was to deter "organized bands of men, assuming the disguise of savages, with arms in their hands, [who] have already bid defiance to the law, its process and its officers, and, in repeated instances, and in more than one county, put the life of the sheriff or his deputies in imminent peril." Message from the Governor to the Senate and Assembly, delivered January 7, 1845, Assembly Doc., 68th Sess., 1845, Vol. 1, No. 2, pp. 41-50. These were persons who would "disguise their persons, that they may avoid the responsibilities of their own acts." *Ibid.* They were people who were engaged in "armed resistance" against the sheriff. *Ibid.* The present construction and application of the statute goes completely beyond the contemplation of the Legislature. In such circumstances, there can be no presumption of constitutionality.

Petitioner's conduct—appearing in public attired in female clothing—does not and cannot in and of itself constitute the commission of any crime or offense. Section 887(7), as construed and as applied, does not describe criminal conduct, nor the likelihood of criminal conduct, nor any other danger to the public welfare which could possibly be regulated by the police power of the State. The proscribed conduct was not shown to have involved any relationship with another person or to have affected other persons. The mere wearing of clothing normally worn by the opposite sex is not in itself a danger to the safety, health and welfare of society. Moreover, there is uncontradicted testimony that the true sex of the petitioner was known to his employer, to his fellow employees, to most of his customers, and the one witness who was questioned as to whether she knew petitioner's sex (R. 133). Even more significantly, there was no evidence adduced that petitioner attempted to conceal his identity, as distinguished from his sex, nor did the trial court require such evidence as a predicate for a finding of guilt. Petitioner habitually wears female clothing and has done so for three years. To do so is consistent with his identity and defines his identity. "Identity" is defined as "unity and persistence of personality". *Webster's New International Dictionary* (2d ed. 1945). Petitioner would be concealing his identity only if he wore men's clothing.

Petitioner is a transvestite (R. 144, 145). There is no criminal or other harmful conduct which flows from such a status. Transvestism is characterized by the turning away from a living human object and its replacement by

something inanimate. Balint, "Perversions and Genitality," in *Perversions* 18 (Lorand & Balint ed. 1965). There is a substitution of the human partner by some inanimate thing. Balint, *supra,* at 24.

Clearly, then, the transvestite is harmless to society. He does not need any relationship with another person. In fact, he is less likely to cause harm to others than the "normal" heterosexual individual. The harassment of the transvestite cannot be rationally related in any manner to the protection of society.

In this day and age, petitioner's conduct can hardly be said to offend public decency. Today's fashions result in long hair for men and cropped hair for girls; pants-suits, trousers and boots for girls and sequined evening coats for men. See New York World Journal Tribune, January 16, 1967, p. 10. For that matter, there were, no doubt, many a powdered wig, shoes with buckles and ruffled sleeves at the Constitutional Convention in 1789. Modern surgical innovations would also seem to make meaningless the sanctions of this statute. See New York Times, November 21, 1966, p. 1.

To criminally punish for conduct completely disassociated from any criminal intent and totally unrelated to any criminal act cannot be defended on any grounds. The State, in effect, is arbitrarily making mere status a criminal offense—status from which no criminal conduct naturally and rationally flows.

Even assuming *arguendo* that there is a governmental purpose here and that it is legitimate, "that purpose

cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960).

II

Petitioner's condition, transvestism, is reflected in the habitual wearing of female clothing. Section 887(7), as construed and as applied, makes criminal the manifestation of this condition without any showing of any misconduct. To do so is cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. See *Robinson* v. *California,* 370 U.S. 660 (1962).

Petitioner's condition is in reality an illness which is contracted involuntarily. Once the condition has manifested itself, the transvestite, like the narcotics addict, is helpless to resist.

> "[W]e must remember that in the case of the habitual criminal the conscious which takes part in the crime can be influenced to some extent, while the conscious will of the perverse individual is absolutely unable to change any of his perverse sexual drives." Alexander & Staub, *The Criminal, the Judge, and the Public* 132 (1962).

Petitioner has not committed any antisocial or disorderly acts. He has not accosted anyone or attempted in any way to impose himself on other persons. He is no more a criminal than a person who is "mentally ill, or a

leper, or * * * afflicted with a venereal disease." See *Robinson* v. *California, supra,* at 666. In fact, his illness or condition is manifested in a totally harmless manner.

> "We would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for being sick. This age of enlightenment cannot tolerate such barbarous action." *Robinson* v. *California, supra,* at 678 (concurring opinion).

III

Even if it had not been construed and applied in an unconstitutional manner, Section 887(7) is unconstitutionally vague and therefore void on its face.

A penal statute must provide acertainable standards of guilt. *Winters* v. *New York,* 333 U.S. 507 (1948). Persons within the scope of the statute must be clearly defined, *Lanzetta* v. *New Jersey,* 306 U.S. 451 (1939), as must the acts proscribed. *United States* v. *Cardiff,* 344 U.S. 174 (1952). Men of common intelligence should not be left to guess at its meaning. *Connally* v. *General Construction Co.,* 269 U.S. 385 (1926). Section 887(7), on its face, meets none of these standards. Any number of meanings may be ascribed to "covered," "concealed," "disguised," "calculated" or "identified."

The words of Mr. Justice Frankfurter, referring to vagrancy type statutes, are relevant:

> "These statutes are in a class by themselves, in view of the familiar abuses to which they are put. See Note, 47 Col. L. Rev. 613, 625. Definiteness is de-

signedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense. In short, these 'vagrancy statutes' and laws against 'gangs' are not fenced in by the text of the statute or by the subject matter so as to give notice of conduct to be avoided." *Winters* v. *New York*, 333 U.S. 507, 540 (1948) (dissenting opinion).

IV

Detective Farrell stated at the hearing on the motion to suppress that he arrested petitioner for female impersonation in violation of Section 887(7) of the Code of Criminal Procedure and that he did not arrest petitioner for grand larceny. Petitioner was booked and arraigned by Detective Farrell for possession of barbiturates and marijuana and for impersonating a female. In denying petitioner's motion to suppress, the court stated that it agreed with petitioner's contentions as to the arrest concerning the checks, but accepted the officer's testimony as to the masquerading by petitioner in his presence and therefore had proper grounds to make an arrest on that set of facts. The ensuing search was therefore incidental to a lawful arrest. This decision with its findings became the law of the case and the trial court and prosecution were bound by it. New York Code of Criminal Procedure §813-d(2).

Since Section 887(7) is unconstitutional, any arrest for violation of that section is unlawful. If there was no lawful arrest, the search of petitioner's hotel room was unlawful

and the fruits of that search are inadmissible as evidence and should have been suppressed. Without such evidence there is no basis for the conviction for possession of barbiturates and the conviction must be reversed.

Aside from the unconstitutionality of the statute upon which the arrest was based, the search was illegal since it was made without a warrant and there was no arrest warrant or probable cause for the arrest. See *Beck* v. *Ohio,* 379 U.S. 89, 91 (1964); *Henry* v. *United States,* 361 U.S. 98 (1959); *United States* v. *Rabinowitz,* 339 U.S. 56, 60 (1950).

There was no probable cause for an arrest based upon Section 887(7). Detective Farrell testified that he did not recognize petitioner when he saw him on the street. It was only after he had secured admission to petitioner's room through the authority of his office that he recognized that petitioner and the person who he saw on the street were one and the same. Such an arrest cannot be sustained. See *Johnson* v. *United States,* 333 U.S. 10, 16-17 (1948).

Even assuming that petitioner was arrested for grand larceny or forgery, as Detective Farrell testified at the trial, the arrest was unlawful. Detective Farrell should have obtained a warrant for petitioner's arrest. He had been requested to apprehend petitioner two or three weeks before he actually made the arrest. During this period it would have been a simple matter to have secured a warrant. However, as Detective Farrell testified it "never occurred to me." The arrest without a warrant after such a time lapse is inexcusable and as a result the arrest was

unlawful. See *McDonald* v. *United States,* 335 U.S. 451 (1948); *Johnson* v. *United States, supra.*

Furthermore, there was no probable cause to arrest petitioner for grand larceny or forgery. Detective Farrell was asked to arrest petitioner by a detective in Brooklyn. Detective Farrell testified that he believed that the detective gave him the charges over the telephone, grand larceny and forgery, and that he said it had something to do with a check or perhaps two checks. These facts were the basis for any arrest for grand larceny or forgery. Detective Farrell did not know, nor does the record show, the basis, if any, of the knowledge of the Brooklyn detective. This does not even begin to approach the standard of probable cause required for an arrest without a warrant. See *Beck* v. *Ohio, supra; Wong Sun* v. *United States,* 371 U.S. 471, 479-80 (1963); *Jones* v. *United States,* 362 U.S. 257, 269 (1960); *Henry* v. *United States,* 361 U.S. 98, 102 (1959); *Nathanson* v. *United States,* 290 U.S. 41 (1933); *United States* v. *Bianco,* 189 F.2d 716, 719 (3rd Cir. 1951).

Furthermore, the search went beyond the permissible limits of a search incident to a lawful arrest. Petitioner testified that the arresting officers searched drawers, closets; bed and bathroom (R. 46-47). Detective Farrell admitted making a thorough search of petitioner's room, stating, "We were looking for any evidence of any violation of law" (R. 107). He also testified, when asked whether he believed that he would find any evidence of the grand larceny crime or the forgery, "No, I wasn't looking for any. No, I didn't believe I would. I had no opinion. It never entered my mind" (R. 39).

The barbiturates and marijuana which were seized have no relation to any of the charges which could justify the arrest. Searches of this nature are apparently a matter of general practice by the police (R. 107). The present case is a perfect example of the use by the police of status crimes as a means to circumvent constitutional safeguards.

The search here went far beyond the permissible scope of a search incident to arrest. This Court stated in *Preston* v. *United States,* 376 U.S. 364, 367 (1964):

> "Unquestionably, when a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused *for weapons or for the fruits of or implements used to commit the crime. Weeks* v. *United States,* 232 U.S. 383, 392 (1914); *Agnello* v. *United States,* 269 U.S. 20, 30 (1925). This right to search and seize without a search warrant extends to things under the accused's immediate control, *Carroll* v. *United States, supra,* 267 U.S., at 158, and, to an extent depending on the circumstances of the case, to the place where he is arrested, *Agnello* v. *United States, supra,* 269 U.S., at 30; *Marron* v. *United States,* 275 U.S. 192, 199 (1927); *United States* v. *Rabinowitz,* 339 U.S. 56, 61-62 (1950). The rule allowing contemporaneous searches is justified, for example, by the need to seize *weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime*—things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control." (Emphasis added.)

A general exploratory search such as the one here is not permissible either with or without a warrant. See *Go-Bart Co.* v. *United States,* 282 U.S. 344 (1931); *United States* v. *Lefkowitz,* 285 U.S. 452 (1932); *Stanford* v. *Texas,* 379 U.S. 476 (1965).

Conclusion

For the reasons set forth above, the petition should be granted.

Respectfully submitted,

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February 9, 1967